



Richard E. Van Deusen

Business Communications Management Consultant

110 West 90th Street, Ste 1 M, New York, NY 10024-1208, Tel: 646.386.7564/Fax: 646.386.7049

www.media-strategies.com/revand@media-strategies.com

Media Management Issues

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CONTRACTOR CRACKDOWN

The IRS is turning up the heat on the employee vs. contractor issue. On February 18, a **New York Times** front page article headlined: “A Crackdown on ‘Contractors’ as a Tax Dodge,” reported that the IRS was now “aggressively pursuing” companies that misclassify employees as contractors. Apparently the new Federal budget is based on collecting \$7 billion over the next ten years in additional tax revenues and fines resulting from uncovering such misclassifications. The article went on to say the IRS has hired more enforcement staff and has started to audit 6,000 company payrolls. And, some states are reported to have initiated successful lawsuits against companies accused of misclassifying contractors.

This is an ongoing issue for media managers. Many of us remember what the happened to American Express in the 1980’s and, more recently, Microsoft. It has been a recurring issue over the past 30 years.

A recent request for information about contractor hiring practices among members of the Communications Media Management Association, (CMMA) yielded inconclusive results. Given variations in corporate policies and staff legal opinions that was to be expected. In the absence of definitive IRS standards it will very likely be impossible to reach a consensus.

The 2009 CMMA member investment survey indicated that every member company used at least some freelancers or contractors last year. The average spent was over \$184,000, which, though it was 30% lower than 2008 expenses, was more than any other software, services or hardware category in the survey.

The 1994 ITVA/IRS agreement, established a definition of “contractor” for the media production industry. That agreement stated that the only job functions that meet the contractor classification, are incorporated professionals, operating independently of direct supervision, providing services to many different clients, paid on project rather than hourly basis and, where appropriate, using their own equipment. Directors, producers, scriptwriters, DPs, LDs and composers clearly fall into the contractor category.

On the other end of the scale are the job functions that the IRS classifies as employees just on the basis of the job function and the amount of supervision required. That includes editors, camera and tape operators, cg/effects operators and production assistants. However some of those specialists can qualify as contractors if they operate independently, use their own equipment, rather than that of the client, and meet all the other contractor criteria. By the way, paying for training for a contractor is an automatic red flag.

Most production crew positions, working in a client facility and using client equipment, must be treated and paid as employees. (As one staffing company told me, there’s no way a Production

Assistant could qualify as a contractor under any circumstances – it's all about the job description.) The bottom line is: paying occasional freelancers, much less permalancer/contractors on a 1099 can leave your company open to significant fines. Governments want to be sure of collecting withholding taxes and payments for Medicare and unemployment insurance, especially in these difficult times.

On April 30, the **Times** reported that the Labor Department was considering requiring companies that classify workers as independent contractors to prepare written explanations of why they should not be employees. That report would have to be provided to the government and the workers. Only time will tell where that one goes.

The safest current strategy is to contract with a staffing service to act as employer of record for all freelancers and full time contractors. The staffing service then becomes the de-facto employer of the contractors and will handle all payroll taxes and paperwork. Some also provide benefits, such as health and workmen's compensation insurance, which is an added and valued benefit for freelancers and is required in some states. Your accounting department will love you. They hate issuing 1099s. More than half of the CMMA members responding to the request for information reported they now use a staffing service. Others suggest it's a question of managing the risk, or not necessary because of the infrequent use of contractors. Other issues relate to retaining qualified contractors or time limits placed on how many years contractors can be retained without hiring or releasing them.

Companies such as **AVI/SPL, Maslow Media Group, Media Services/Crewstar** and **Team People** provide payroll and staffing services for freelancers and full time contractors specifically for corporate media production and facilities operations. **Acquent** is another company specializing in communications creatives. Companies such as Manpower and Kelly also provide employer of record services, but aren't well equipped to deal with media production job functions. If you're not already using a legally recognized staffing service, you should seriously look into it. You don't have to buy into the service, just get the facts.

However, we also hear that using a staffing service may not relieve the company of the burden depending on the specific situation. If your law department tells you not to worry about it, be sure to get that opinion in writing. And, as that same law department will certainly tell you, defending a lawsuit is far more expensive than any settlement, and, certainly more expensive than doing it correctly in the first place.

Along the same line, we occasionally get requests for information about freelance and contractor rates of pay. Other than the logistical nightmare of common job descriptions, experience levels and geographic differences, we are not so sure that is legally permissible. Using that information to set freelancer pay scales could be considered price fixing. The bottom line is, what is the service worth to the client.

ARE YOUR INTERNS LEGAL?

As if the contractor issue weren't enough of a problem in this era of staff cuts and salary freezes, an article in the business section of the **NY Times** on April 3 was headlined: *The Unpaid Intern, Legal or Not*. Apparently both federal and state regulators are concerned that some unpaid internships are nothing more than free labor. California and Oregon, have fined companies found to be using them that way. An internship, by definition, is a learning opportunity. Federal Law requires the internship to be similar to vocational school or academic training, there must be direct and ongoing supervision, and the work done by the intern must not provide an immediate advantage (i.e. revenue) to the company. Though an intern may do the

same work as some employees, the intern may not displace an employee or do the same work previously done by a paid employee. In a follow-up story on April 10, it was reported that California has taken the position that the work of an intern is acceptable even if it provides an immediate advantage (that is, generate business or direct profit) if the employer provides both direct supervision and spends money on training.

Most companies and schools that provide interns, have programs to assure the interns get a real educational experience with defined outcomes, whether paid or not. Having an intern spend a semester packing gear or cataloging the media library files is not valid. The counsel for California's Labor Standards Division cited a guidance letter specifically for film studios which said that film studios should pay college students doing routine work, such as delivering messages and filing tapes and clipping newspaper articles, because it was similar to work done by regular employees and could displace such an employee. I assume that also covers going for coffee.

In the late 1980s, Prudential brought a regular stream of interns through our shop. I insisted they receive minimum wage, even if their colleges did not want them to be paid. Hey, it costs money to get to work, eat lunch, etc. They were given specific project-related activities, assigned mentors, were debriefed regularly by at least one manager, and we submitted full reports on their activities to the colleges. When openings came available two of them got full time jobs with us. Others continued working as freelancers. One intern was given the opportunity to direct a community service video for Mothers Against Drunk Driving which was widely distributed and used for several years.

WHO ARE THE EXPERTS?

I'm on Ragan Communications' e-mail list. Chicago-based Ragan (www.ragan.com) is a highly respected national PR Consulting firm and a great source for industry information. Over the last 15 years they have built an extensive seminar series, and are now hosting webinars designed to help corporate communications executives improve their ability to engage employee, customer and public audiences. They really do know what they're doing and I found some of their material worth quoting in "**Driving Success.**"

However, sometimes I think they are pushing the envelope too far outside their area of competency. Last November they announced a Webinar entitled **Telling Better Stories with Video** it was described as follows:

"Too many communicators are diving head-first into online video without thinking through the purpose and goal of their story. The resulting videos are too long, too meandering and frankly, too boring to ever be effective. No more. In this 90-minute webinar, online video expert Justin Allen will give you a blueprint for producing more effective and engaging videos. No more talking heads. No more eight-minute pieces about employee recognition ceremonies. And no more boring, pointless videos".

Hello, but is any of that news to us??? I'm sure Justin Allen knows his subject, but I'm also sure that every CMMA member makes these points every day – hopefully successfully. I have visions of some low level PR staff writer attending the Ragan seminar then rushing to tell the in house media professionals how to produce engaging videos, which is what the in house professionals have been trying to train the PR staff how to do all along.

MEDIA DEMOCRATIZATION

This isn't political, just social - social media, that is. Democratization is when your boss' brother in law bought a Handicam and a copy of Final Cut Pro and set himself up as a video producer, working out of his garage. It is the administrative assistant creating Power Point shows for the boss. The latest iteration is the You Tube age, when everyone who can get his or her hands on digital camera, including the boss, is uploading all kinds of images to the Web, much of it self-serving and pure crap, of real interest only to the talentless and clueless egomaniac who shot it. To compound the injury, Getty Images is now licensing and paying royalties on photos posted by amateur photographers on Flickr. What's more, supposedly professional graphic designers are licensing these amateur photos for everything from Web sites to annual reports. Not great news for professional photographers.

However, properly managed, democratization can also yield positive results. And, the Flip Camera has provided an ideal tool. When the camera was first introduced, companies started sending them to employees working in remote locations and asking them shoot video about their jobs. The video was then edited and distributed, often on company Web sites. At a CMMA regional meeting in March 2010, Clif Brewer reported on a program he developed for Campbell Soup. This involved sending cameras, tripods and instructions out to research centers around the world, and asking the teams to report on their activities. The results Clif showed were pretty decent and were also the only economically possible way to gather the material. The fact that Cisco purchased Pure Digital Technologies, the Flip manufacturer is a pretty strong endorsement. However, at the CMMA meeting someone mentioned that the Kodak Zi8, with a microphone input, was actually better suited to these kinds of projects. Some on line reviews bear that out – for now at least.

Coincidentally, Ragan Communications announced their own Webinar on the subject featuring a presentation by Cisco's director of social media. This broadcast was priced at a modest \$99. Perhaps Cisco kicked in for "product placement." The program highlights included using Flip for media training, producing social news releases, using the video on blogs and in press releases and, of course, on Facebook and YouTube. There's no mention of getting the media department involved. We wonder what those amateurish, unvetted videos do for the corporate image.

TELEPRESENCE FOR ALL

Speaking of Cisco, the April 8 **Meetings Net Tech Extra** newsletter reports that: *"Bank of America is making a dramatic investment in virtual meetings. By the end of 2010, the financial giant will have the world's second-largest corporate network of Cisco TelePresence videoconferencing systems—second only to Cisco itself."* Personally I can't think of a better way to spend that TARP money.

WHAT'S AHEAD

Herewith a new format and a new purpose. Last August's 10th Trends Report was the last of a series that began right after 9/11/2001. Driving Success put it all together, so how much more was there to say? Besides, the trends idea was getting stale.

However, there is always news and opinions and I seem to have a communications imperative (translate – need to tell it all). Besides which there really is no other source for this kind of stuff. I could, post this on my Web site, but you'd have to go there to find it. In the age of information overload, if you want people to hear what you have to say, you've got to push it out to them, a la

LinkedIn and Facebook. Since nobody jumped on my blog I'm reduced to the old-fashioned print medium.

Here then, is the new model: a newsletter to surface some of what media managers deal with on a daily basis. It will continue to enhance the Driving Success publication, but with less formality. I'll probably be threatened with a variety of lawsuits along the way.

As always, I welcome any comments or suggestions to help media managers leverage the strategic value of effective communications media. By the way, as far as trends go, business is looking better, but it's been a long, slow fade in.

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